IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re FRANK C. PEASE, Debtor.	U.S. Bankr. Ct. District of Connecticut Case No. 93-53692 Chapter 7
JEFFERSON FINANCIAL SERVICES, INC., Plaintiff/Counterdefendant, v. FRANK C. PEASE, Defendant/Counterplaintiff.	Adv. Pro. No. 94-2126

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

A trial of this action was conducted on December 18, 1995, upon (1) two counts by plaintiff/counterdefendant, Jefferson Financial Services, Inc. ("JFS"), seeking an order declaring two loans to the debtor nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A); and (2) the debtor's claim for costs of this proceeding pursuant to 11 U.S.C. § 523(d). Post-trial briefs having now been filed and considered, the court concludes that JFS is entitled to an order of nondischargeability regarding those two loans and that the debtor's claim for costs should be denied. The following findings of facts and conclusions of law are made pursuant to Fed. R. Civ. P. 52(a), as incorporated by Fed. R. Bankr. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

I.

Although this proceeding is saddled with a voluminous procedural history, the debtor's argument in his post-trial brief that he has been treated unfairly and denied "due process" in the prosecution of his countercomplaint compels the court to set forth the majority of it here. The record reflects that the underlying chapter 7 bankruptcy case was filed by the debtor on November 17, 1993, in the District of Connecticut, where it remains pending. JFS initiated this adversary proceeding in

that district on April 25, 1994, with the filing of a complaint against the debtor containing ten counts pertaining to the nondischargeability of debts under § 523(a) and five counts objecting to the debtor's discharge pursuant to 11 U.S.C. § 727. The debtor filed an answer to that complaint on June 8, 1994, which not only included a response to the allegations in the complaint, but also some thirty-five paragraphs entitled "special defenses." The answer was accompanied by the debtor's countercomplaint against JFS consisting of five counts. Less than a week later, the debtor filed and served his first request for answers to interrogatories (consisting of 60 questions and 136 subquestions) and a request for production of documents which were directed to JFS. That discovery was premature since the parties had not first met and conferred as required by Fed. R. Bankr. P. 7026(f). *See* Fed. R. Bankr. P. 7026(d).

Over the course of the next several days, the debtor filed a series of motions. On June 24, 1994, the debtor filed a motion "to initiate federal grand jury indictment process" wherein he contended that JFS, its officers, manager and legal counsel "conspired to commit fraud ... [and] forgery, [and] ... committed fraud and ... forgery in this cause." The central jist of that motion is found in the affidavit of the debtor filed in support which alleges, ***inter alia***, that exhibit I to

JFS's complaint is a "photocopy forgery." That same day, the debtor also filed a motion "for joinder of party counter-complaint defendants" requesting that Robert Schwalb, president of JFS, Johnny Branson, vice-president of JFS, Ann Wright, the office manager for JFS, and Douglas Beier, JFS's legal counsel, be joined as additional defendants to the debtor's countercomplaint notwithstanding the fact that they were not named as defendants therein and no cause of action was asserted against them in the countercomplaint. A few days later, on June 27, 1994, the debtor filed a motion "to non-suit plaintiff's complaint" based on the ground that a proof of claim filed by JFS in his ex-wife and codebtor's bankruptcy case states that "all secured collateral has been recovered and sold with proceeds applied to reduce Debtor's balance," while JFS alleges in its complaint that the debtor has disposed of a power planer which was security for its loans to the debtor. The debtor's position is that the two documents are in conflict, apparently because the proof of claim states that all collateral was recovered and JFS claims in this lawsuit that the debtor sold and transferred the power planer, thus preventing its recovery.

Each of the debtor's motions was met with an objection by JFS and a request for a hearing thereon. JFS also filed a belated motion for enlargement of time to answer the

countercomplaint on July 5, 1994. That motion to extend the time for filing an answer for an additional twenty days was objected to by the debtor on July 11, 1994. That same day, the debtor also filed a motion for sanctions against JFS for failing to respond to the interrogatories and document request although less than thirty-three days had elapsed from the date the debtor served that discovery upon JFS by mail. *See* Fed. R. Civ. P. 33(b)(3), incorporated by Fed. R. Bankr. P. 7033, and Fed. R. Bankr. P. 9006(f). On July 22, 1994, JFS filed an objection to the debtor's motion for sanctions, contending that the debtor had not complied with the pertinent local rules concerning the discovery requests and that the filing of the sanctions motion itself was not in compliance with the local rules.

On July 25, 1994, JFS filed its answer and special defenses to the debtor's countercomplaint. On August 11, 1994, JFS filed a motion to transfer venue of this adversary proceeding on the basis of *forum non conveniens*. Thereafter, on August 16, 1994, the debtor filed an objection to JFS's motion to transfer venue. The debtor also filed a motion for default for failure to answer the countercomplaint "timely and properly." In that motion, the debtor acknowledged that he had received an answer from JFS, but that the answer was served "17 days after the time allotted by the Federal Rules of Civil Procedure, with no extensions of time

granted by the Court." The debtor also complained that JFS's answer contained "contradicting, conflicting and inadequate answers to paragraphs 2 and 3 of Counts 1, 2, 3, 4, and 5." Not unexpectedly, JFS objected to the debtor's motion, arguing that it had filed a request for extension of time which had yet to be ruled upon and that it had filed an answer. On September 12, 1994, JFS filed a motion for leave to amend its answer to the countercomplaint, with a copy of the proposed amended answer attached thereto. Apparently, the amendment was made to address the debtor's complaints as raised in his motion for default. As might be expected, the debtor, on September 21, 1994, filed an objection to JFS's motion for leave to file its amended answer.

A hearing was held on October 17, 1994, before the Hon. Alan H. W. Shiff, U.S. Bankruptcy Judge, upon JFS's motion to transfer venue of the adversary proceeding to this court. An order granting the motion was entered that same day.

After receiving the adversary proceeding with all the remaining motions pending, and after considering those various motions, this court entered an order on December 5, 1994, granting JFS's motions for additional time for filing an answer to the countercomplaint and for leave to file an amended answer since the granting thereof would not prejudice the debtor. The court denied the debtor's motion for default judgment on the

countercomplaint, because, although JFS's motion for enlargement of time had been belatedly filed, good cause for the extension existed and the answer fairly and concisely addressed the allegations of the countercomplaint. The court also denied the debtor's motion for nonsuit of the complaint because the motion itself was procedurally improper and a copy of the allegedly contradictory proof of claim was not attached as stated by the debtor. The debtor's motion to initiate a grand jury indictment was denied as well since the relief sought was beyond the powers of the court. The court reserved ruling on the debtor's pending motions for sanctions and for joinder and directed that the parties appear on January 10, 1995, for a hearing thereon and for a scheduling conference pursuant to Fed. R. Civ. P. 16, as incorporated by Fed. R. Bankr. P. 7016. That order was served by the clerk upon the debtor at his address listed upon the numerous documents which he had previously filed in this adversary proceeding, 1313 Sterling Oaks Drive, Casselberry, FL 32707.

As noticed, a hearing was held on January 10, 1995, upon the debtor's motions for sanctions and joinder. The debtor did not appear. After hearing argument from JFS's counsel, the court determined that the debtor's motions for sanctions and joinder should be denied. Because JFS's counsel also stated

that he intended to file a motion for summary judgment on the complaint, the court directed that any such motion be filed within ten days and that any response be filed within fifteen days thereafter. The pretrial conference was continued to March 7, 1995, and an order to this effect was entered on January 18, 1995.

JFS filed its motion for summary judgment on the complaint on January 13, 1995. On January 18, the debtor filed an objection to that motion, listing a current address of c/o Hamblen County Jail, 510 Allison Street, Morristown, TN 37814.[1] The court rendered its decision on the motion for summary judgment on March 22, 1995, granting JFS summary judgment on counts 2 and 4 of its complaint, dismissing alternative theories of relief in counts 3 and 5 as being moot, and denying summary judgment on the remaining six counts pertaining to dischargeability of debts and five counts objecting to the debtor's discharge. The basis for granting summary judgment on counts 2 and 4, which involved loans made to the debtor on June 17 and July 21, 1992, in the respective amounts of $5,135.56 and

[1]By the filing of this objection, the Debtor made his first appearance before the court since the adversary proceeding was transferred to this court upon JFS's motion. Even though the debtor's address listed upon that document was not the same as listed upon all the previous documents filed by the debtor in this adversary proceeding, the debtor did not file a notice of change of address.

$4,681.12, was that the debtor's unauthorized sale of the power planer which was pledged as security for those loans was established by the debtor's guilty plea in state court to "hindering secured creditors," namely JFS, and that the elements of that criminal offense were the same elements as needed to establish the nondischargeability of those two loans under § 523(a)(6). Because these issues had been raised, were necessary to the determination of the conviction and were actually litigated, the debtor was collaterally estopped from denying the allegations in counts 2 and 4 of JFS's complaint.

On March 7, 1995, the date the continued scheduling conference was to be held, a conflict in the court's docket necessitated that the clerk contact the parties to inform them of the court's intent to reschedule the conference. The clerk was able to contact JFS's counsel in this regard, but attempts to contact the debtor were unsuccessful. In any event, the debtor did not appear on March 7 at the time the scheduling conference was set. The case was called, and the court adjourned the scheduling conference to March 28, 1995. At the reset scheduling conference on March 28, 1995, the debtor again did not appear, but the court nevertheless established a pretrial schedule as set forth in its order of April 4, 1995.

On March 30, 1995, JFS filed a motion to dismiss and for

sanctions for failure of the debtor to appear at the pretrial conferences. By order entered April 5, 1995, the court directed the debtor to appear on April 18, at 11:00 a.m., and show cause why the relief sought by JFS should not be granted, including dismissal of the countercomplaint and entry of default judgment upon the complaint. The case was called on that date and time, and once again the debtor was absent. Accordingly, the court orally granted the motion of JFS for sanctions, and as relief, stated that the countercomplaint would be dismissed and that an award of attorney fees would be considered upon the filing of an affidavit by Mr. Beier. That afternoon, at 3:03 p.m., the clerk received from the debtor, by UPS next-day air mail, a "request for clarification of trial judge's probable conflict of interest,[2] a motion to set aside all orders of the court, a notice of change of address, and a letter addressed to the court stating, *inter alia*, that "due to such short notice, I will be unable to appear in court on April 18, 1995, subsequently

[2]The "clarification of the trial judge's probable conflict of interest" to which the debtor referred was based upon the fact that this trial judge had earlier served as a standing chapter 13 trustee in this district, and in that capacity, had been appointed trustee in the bankruptcy case of the debtor's ex-wife, Audrey Pease. The debtor concluded in his motion that there could be a lack of impartiality by the court in this proceeding, although, as noted below, he later withdrew that motion and announced that he had no reservations that this trial judge could act impartially in this proceeding.

requesting a rescheduling of such hearing." Since the debtor was proceeding *pro se*, and because a copy of the letter was served upon counsel of JFS, the court treated the letter as a belated request for continuance of the show cause hearing. The order further admonished the debtor to refrain from sending any other letters to the court and directed that any further communications to the court must be in the proper form of a motion. In an order entered April 20, 1995, the court directed that a hearing be held on the belated motion for continuance of the show cause hearing, together with the debtor's request for clarification and motion to set aside orders.

On April 21, 1995, the debtor filed a motion to disqualify plaintiff's counsel for failure to file an appearance and serve the same upon debtor, and for the alleged failure of JFS's counsel to serve copies of other various documents upon him. That motion was also set for hearing on May 9, 1995. On May 3, 1995, the debtor filed a motion to continue the various matters which he had filed from the present setting of May 9 until May 23, when the court had scheduled a final pretrial conference pursuant to its order of April 4, 1995. By order entered May 4, 1995, the court granted the debtor's motion for continuance.

On May 19, 1995, the debtor filed a request to withdraw his motion to set aside all orders of the court, an objection to

JFS's motion to dismiss the countercomplaint, and a motion to amend orders of the court. On May 23, a hearing was held on all the pending matters. The debtor announced at the hearing that his request for clarification of trial judge's probable conflict of interest was withdrawn and, accordingly, the hearing thereon was stricken. The court granted the debtor's request to withdraw his motion to set aside all orders and belated motion for continuance of the show cause hearing. After hearing from the parties, the court struck the show cause hearing and denied JFS's motion to dismiss and for sanctions. The court denied the debtor's motion to amend orders and his motion to disqualify JFS's counsel. The final pretrial conference was also stricken in light of the parties' need for additional time to prepare for trial, and the court proceeded with the initial scheduling conference. The parties agreed that discovery would be completed by August 31, 1995. The trial was scheduled for the week before Christmas to accommodate the debtor's travel arrangements. Also, as set forth in the order entered June 1, 1995, the parties agreed that a final pretrial conference would be conducted on November 14, 1995.

On May 30, 1995, JFS filed a notice of debtor's deposition for June 22, 1995. On June 16, 1995, the debtor filed a request for leave of the court to serve over 25 interrogatories, a

second request for interrogatories containing 30 questions and 100 subquestions, a second request for production, and an objection to JFS's notice of deposition based upon the grounds that he had not been subpoenaed and paid a witness fee, and otherwise, because he could not afford to travel to Tennessee for the deposition. On June 27, 1995, JFS filed an objection to the debtor's second set of interrogatories and request for leave of court to serve over 25 interrogatories upon the ground that the debtor was attempting to abuse the discovery process, a motion to dismiss the countercomplaint and for entry of default judgment on the complaint for failure of the debtor to appear for his deposition as noticed, and a motion to dismiss the countercomplaint for failure to state a claim upon which relief can be granted. On that same day, the debtor filed a motion "to cease intimidating, harassing and threatening correspondences" which he had purportedly received from JFS's counsel. Three days later, the debtor filed a motion for sanctions for failure of JFS to serve answers to the interrogatories and request for production of documents.

On July 21, 1995, the court filed a memorandum opinion and entered an order concerning JFS's motion to dismiss countercomplaint for failure to state a claim and the discovery disputes, with the exception of the debtor's most recent motion

for sanctions. Regarding debtor's objection to plaintiff's notice of deposition, the court directed counsel for JFS and the debtor to in good faith mutually agree upon a date and time for the deposition of the debtor, and since the debtor had stated at the pretrial conference on May 23 that he intended to take the depositions of representatives of JFS, times and dates for the depositions of any agents or officers of JFS which the debtor desired to take, and for the document production by both parties. In order to resolve the issue of where the debtor's deposition would be taken, in Tennessee or Connecticut, the court ordered the debtor to file a statement within ten days of entry of the order whether he would be coming to Tennessee to depose JFS's representatives for discovery purposes or to examine and copy any documents requested of JFS as he had previously indicated. In the event the debtor would be traveling to Tennessee for these purposes, the debtor's deposition would be taken in Tennessee. However, if the debtor's statement indicated that he had decided not to conduct discovery in Tennessee, the court, as a matter of equity, would not require the debtor to be deposed in Tennessee since JFS had counsel in Connecticut who was familiar with the case and could therefore depose the debtor in Connecticut. JFS's motion to dismiss for failure to provide discovery was denied.

Regarding the debtor's second set of interrogatories, the debtor's request for leave of court to serve interrogatories in excess of 25, and the objection by JFS to the same, the court sustained JFS's objection, finding the interrogatories to be unduly burdensome. The court stated in its order of July 21 that "[i]f the debtor chooses to resubmit a set of interrogatories which do not exceed 25 in number, including subparts, and which seek discoverable information within the scope of Fed. R. Civ. P. 26(b)(1), the debtor may do so." As for debtor's motion to cease intimidating, harassing and threatening correspondence, the court directed both the debtor and JFS to eliminate all derogatory, degrading or otherwise unprofessional communications.

And finally, with respect to JFS's motion to dismiss the debtor's countercomplaint for failure to state a claim, the court directed that (1) the designation of counterclaims of the debtor's first and second counts be stricken and the counts be treated as defenses to the complaint by JFS[3]; (2) the debtor be

[3]The debtor's first count alleged that he entered into an agreement with JFS whereby certain sales contracts of the debtor would be purchased at a discount by JFS and assigned thereto with recourse. The debtor averred that one such contract with Robbin Glover was purchased by JFS, and that subsequently, she defaulted in the payment of the contract. JFS filed a collection action against Ms. Glover, and upon trial, the court ruled in her favor because JFS was unable to prove the (continued...)

allowed ten days to set forth in an amended countercomplaint the specific statutes or regulations upon which he was relying in the third count which alleged violation of "Lender Liability Laws" by JFS in refusing debtor's attempts to compensate JFS for delinquent payments on various loans and to state with greater specificity the occasions upon which payments were allegedly tendered to, but refused by JFS; (3) the debtor be allowed ten days to set forth in an amended countercomplaint the specific

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[3](...continued)
authenticity of Ms. Glover's signature on the contract. The debtor alleged that he was not advised of the trial or otherwise subpoenaed to appear, and that if he had been, he could have testified that Ms. Glover signed the contract. As relief, and because JFS allegedly made false accusations concerning the debtor and this transaction, the debtor requested that JFS not be awarded any compensation. *Count 1* of JFS's complaint alleged that the funds which the debtor obtained from the sale of the Glover contract were obtained upon false pretenses because the signature on the contract was not that of Ms. Glover, and as a result, it was entitled to a nondischargeable judgment in the amount of $1,556.70. Since the debtor was merely restating his defenses to *Count 1* of JFS as a claim, the court struck the counterclaim designation and ordered that the debtor's first count be treated as a defense to JFS's complaint.

The debtor's second count alleged that prior to making the allegations in *Count 1* of its complaint, JFS attempted to collect the same debt from the debtor by filing a criminal complaint against the debtor alleging theft of property under $1000.00. The debtor further alleged that JFS, in connection with its counsel, "conspired to commit fraud by illegally, unjustly and maliciously accusing the debtor of such criminal activity." For relief, the debtor requested that JFS "should not be entitled to further compensation ...." Again, this "claim" by the debtor was nothing more than a defense to the claims of JFS. Accordingly, the court struck the counterclaim designation and directed that it be treated as a defense to JFS's complaint.

statutes or regulations upon which he was relying in his fourth count which alleged that JFS violated "Federal Truth & Lending Laws" by never offering notice of a consumer's right to cancel; and (4) as to the debtor's fifth count which alleged that JFS "submitted to this honorable Court a plethora of Exhibits which are deemed to be forgeries of various types," that it be treated as a defense to JFS's complaint, and, to the extent that the debtor intended to state a claim for damages against JFS as a result of the alleged forgeries, the debtor be allowed to file an amended countercomplaint setting forth the nature of any damages within ten days.

To accommodate the parties, the court, *sua sponte*, amended the scheduling order of June 1, 1995, to allow each party an additional seven days from entry of the July 21 order to make the Rule 26(a)(1) disclosures in writing and serve the same, and to extend the discovery cutoff date from August 31 until September 30, 1995.

By order entered July 26, 1995, the court denied the debtor's motion for sanctions for JFS's alleged failure to provide discovery since JFS had filed a timely objection to the debtor's interrogatories, which was ruled upon by the court in its July 21 order. With respect to the request for production of documents, the court ruled that the debtor had failed to make

a good faith effort to obtain the discovery without court action as required by Fed. R. Civ. P. 37(a)(4), incorporated by Fed. R. Bankr. P. 7037. The court directed JFS to file a response to the debtor's document request within seven days.

JFS filed its Rule 26(a)(1) disclosures on July 28, 1995, and a response to the debtor's request for production of documents on July 31, 1995, both in accordance with the previous directives of the court. On the other hand, the debtor failed to make his Rule 26(a)(1) disclosures within the extended deadline as ordered, and failed to file an amended countercomplaint and his statement of intent concerning discovery within the time allowed. However, on August 1, 1995, the debtor filed a request for expansion of time which sought an extension of time though August 17 in which to file an amended countercomplaint and the discovery statement. On August 8, 1995, the court entered an order granting the debtor's request and, although no request for an additional extension of time to file the Rule 26(a)(1) disclosures was made, gave the debtor through August 17 in which to serve the Rule 26(a)(1) disclosures upon JFS.

On August 17, 1995, the debtor filed an amended countercomplaint, together with a motion requesting an extension of time of ten days to file the statement regarding discovery

and his Rule 26(a)(1) disclosures. In that motion, the debtor also requested that he be allowed additional time to submit an amended request for answers to interrogatories and "argument regarding the need of 'SUB-PARTS' to not be included in the aggregate of the (25) responses to interrogatories." By order entered August 22, 1995, the court again granted the debtor's request for an extension and extended the time for filing the mandatory disclosures and the statement of discovery though August 27, 1995. The court refused, however, to reconsider its ruling limiting interrogatories to 25 in number, and noted that if the debtor intended to serve by mail amended interrogatories not exceeding 25 in number, including subparts, he must do so no later than August 29, 1995, in order that a response thereto may be timely filed by the discovery cutoff date of September 30, 1995.

The debtor's August 27 final deadline for filing his mandatory Rule 26(a)(1) disclosures and his statement concerning discovery passed without any document being filed by the debtor, despite the fact that the deadline for doing so had been extended on three different occasions. On August 28, 1995, JFS filed a second motion to dismiss the countercomplaint, as amended, for failure to state a claim upon which relief can be granted. On September 1, 1995, the clerk received for filing

from the debtor an unsigned document entitled “FRCP 26 INITIAL DISCLOSURES” and a document entitled “NOTICE - STATEMENT” which failed to comply with the court’s directive of July 21 that he file a statement concerning whether he desired to depose anyone in Tennessee for discovery purposes or to examine and copy any documents requested of JFS in Tennessee. Rather the debtor’s notice/statement included the following:

> Although the Defendant maintains that the Court has treated him fairly in most matters, he feels that the Court has exercised an abuse of authority by inhibiting him in his effort to conduct discovery via his two pursuits for “ANSWERS TO INTERROGATORIES.” He further asserts that due to the embellishment of financial difficulties that the only affordable means of discovery is said “INTERROGATORIES” and that by virtue of the Court’s directives, his defense in proving that Plaintiff has conspired to commit fraud and forgery have been severely inhibited. He continues to maintain that such inhibitions may prove to be sufficient grounds for an appeal.
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> ...
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> With the exception of the foregoing representations, the Defendant stands “READY” for the trial scheduled on December 18, 1995 ....

On September 29, 1995, the court ruled upon JFS’s second motion to dismiss the debtor’s countercomplaint, as amended, which had been filed by JFS on August 28, 1995. The debtor had filed no response or objection to the motion to dismiss even though considerably more than fifteen days, the time period for filing responses to dispositive motions as set forth in the

court's order of June 1, 1995, had passed. Notwithstanding the failure of the debtor to object, and the fact that the order of June 1 plainly stated that the "failure to respond [to a dispositive motion] within the time allowed may be deemed an admission that the motion is well taken and should be granted,"[4] the ruling by the court on the motion to dismiss was upon the merits.

The court's memorandum observed that the debtor's amended countercomplaint set forth five counts, three of which were amended counts three, four and five of the debtor's original countercomplaint. The two new counts included in the amended countercomplaint involved a claim for costs and expenses under 11 U.S.C. 523(d) and a claim alleging violation of 18 U.S.C. § 152 by JFS as the result of filing a false proof of claim in the debtor's ex-wife's chapter 13 bankruptcy proceeding. JFS's motion to dismiss did not specifically address the debtor's first count which alleged that he was entitled to recover his costs and fees pursuant to 11 U.S.C. § 523(d) in the event the court found that the request for a determination of dischargeability of consumer debt by JFS under § 523(a)(2) was

[4]Local Bankr. R. 9(c), which is applicable to all adversary proceedings, likewise provides that a "failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion."

not substantially justified. Because JFS did not address this issue, the court accepted the debtor's characterization of the indebtedness owed by the debtor to JFS as "consumer debt," even though there was no indication of which portion of the indebtedness, if any, constituted "consumer debt," and denied JFS's motion to dismiss count one of the debtor's amended countercomplaint.

The second count of the amended countercomplaint alleged that JFS "filed a 'PROOF OF CLAIM' with exhibits in the Co-debtor's [ex-wife's] Chapter 13 bankruptcy which contradicts and conflicts with the representations and claims of this action in that, said Creditor has maintained in said proof of claim that, 'all secured property has been RECOVERED and SOLD and the proceeds applied to reduce debtor's balance.' The Power Planer is purported to be a part of the secured property." Because 18 U.S.C. § 152(4) makes it a crime to knowingly and fraudulently present a false proof of claim, the debtor concluded that JFS "filed a fraudulent claim in this action as a result of maintaining the truth and accuracy of the claim filed in the Co-debtor's bankruptcy action." The debtor requested that either he or his codebtor ex-wife have a judgment "in accordance with 18 U.S.C. § 152."

Although the allegations in the second count were somewhat

confusing, the gist of that count was that JFS either allegedly filed a false proof of claim in the debtor's ex-wife's case or has pursued a false claim against the debtor in this action. Some background was necessary to evaluate that assertion. In its complaint, JFS claims that the debtor, with the intent to defraud JFS, sold a power planer in which JFS had a security interest, that with respect to two of the loans at issue, the debtor provided JFS with a security interest in the power planer after it had already been sold, and that the debtor concealed the transfer of the power planer by falsely testifying that it had not been sold. Because JFS could not recover the power planer from the good faith purchaser, Wyman Dooley with Conasauga River Lumber Co., the debtor alleged that the proof of claim filed in the codebtor's case which actually states that "[a]ll secured collateral has been recovered and sold with proceeds applied to reduce the Debtor's balance" was false. The debtor alternatively argued that if that proof of claim were not false, JFS was pursuing a false claim against him in this adversary proceeding by seeking a nondischargeability determination and denial of discharge based on the debtor's actions with respect to the power planer.

The court, in its memorandum opinion and order entered March 22, 1995, had previously determined that the debtor was

collaterally estopped by his guilty plea and conviction[5] in state court from denying the allegations in Counts 2 and 4 concerning the willful and malicious injury to JFS in selling the power planer, and had granted JFS summary judgment on Counts 2 and 4 asserting the nondischargeability of the loans for which the power planer was pledged as security. In the amended countercomplaint, the debtor was in essence contending that JFS should not be able to take the position in this action that the power planer was security for a certain indebtedness because JFS filed a proof of claim in the debtor's ex-wife's case stating that all secured property had been recovered and sold.

Despite the debtor's obfuscatory tactics in asserting such a claim, the court concluded that the debtor did not have a viable cause of action against JFS based upon this allegation. The court found that even if it were to assume that either the proof of claim was fraudulent or that JFS was asserting a false claim herein as claimed by the debtor, there was no express or implied private right of action accruing to the debtor based

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[5]The debtor was charged with committing and pled guilty to the offense of "Hindering Secured Creditors," TENN. CODE ANN. § 39-14-116, in that he, on September 18, 1992, "did unlawfully, with intent to hinder enforcement of a security interest, security agreement or lien on a 24-inch Enterprise Power Planer (serial no. 70233) held by Jefferson Financial Services, remove, conceal and transfer the property of which the defendant claimed ownership ...." *See* memo. op. of March 22, 1995, at p.3.

upon 18 U.S.C. § 152, a criminal statute.[6] Moreover, the debtor had no standing to assert such an action on behalf of his ex-wife who was not even a party to this action. Accordingly, the second count of the debtor's countercomplaint was dismissed for failure to state a claim upon which relief could be granted.

Next, the court considered the third, fourth, and fifth counts contained in the amended countercomplaint, which were originally asserted in the debtor's initial countercomplaint. The third count stated that the debtor "made an attempt to pay all arrearage to loans that were in DEFAULT on June 30, 1993 and again on July 16, 1993, but the creditor refused to accept said payment when the Debtor refused to allow his wife, the co-debtor to sign a document that was prepared by Attorney Douglas R. Beier that would have incriminated her in addition to the Debtor of criminal activity." Attached to the amended countercomplaint as exhibit 15 is a copy of the document to which the debtor referred. That document appeared to be a proposed order granting the defendants, Frank and Audrey Pease, a continuance of a trial of a collection action in the Hamblen County General Sessions Court in exchange for, *inter alia*, the defendants' promise to pay monies owing on at least six accounts then in

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[6]*See Terio v. Terio (In re Terio)*, 158 B.R. 907, 911-12 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 397 (2nd Cir. 1994).

default. The order was never signed by the parties or entered by the court, apparently because the parties could not reach a mutual agreement. The third count further made the conclusory assertion that because of JFS's refusal to accept payment from the debtor, JFS was guilty of "'BREACH OF CONTRACT and GOOD FAITH' and tortious misrepresentation and promissory fraud which was enhanced by their [JFS's] 'BAD FAITH in ACCELERATION OF FORECLOSURE.'"

With respect to the "breach of contract and good faith" claim by the debtor, the court noted that nowhere in the debtor's third count did the debtor allege what contract or contracts were breached, how the contract or contracts were breached considering the fact that the debtor was already involved in defending an action brought by JFS, or the nature of any damages arising from the breach. Although the debtor did imply that the security for the loans was "foreclosed upon," the debtor did not allege that JFS took some action that it was not entitled to do under its security agreements or that any sale of the collateral was not commercially reasonable. Additionally, the debtor did not aver any facts in support of the allegation that JFS breached its statutory duty of good faith under the

Uniform Commercial Code as adopted by the state of Tennessee.[7] The court concluded that the mere fact that after default by the debtor, JFS was unwilling to compromise the state court lawsuit was insufficient to support a claim for "bad faith."[8]

Likewise, the court concluded that the claims of tortious misrepresentation[9] and promissory fraud[10] were not supported by any allegations which established the necessary elements of such claims, and that the claim of "bad faith in acceleration of foreclosure" was insufficiently pled because the debtor failed to allege, *inter alia*, that either JFS did not have cause to accelerate the loans upon default or that a course of conduct in

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[7]*See* TENN. CODE ANN. § 47-1-203.

[8]*See, e.g., Lane v. John Deere Co.*, 767 S.W.2d 138 (Tenn. 1989).

[9]To establish tortious misrepresentation in a commercial transaction, a plaintiff must show that he has justifiably relied upon false information which has been negligently or intentionally provided for his guidance in a business transaction. *See Jasper Aviation, Inc. v. McCollum Aviation, Inc.*, 497 S.W.2d 240, 242-43 (Tenn. 1972).

[10]Promissory fraud consists of an intentional misrepresentation with regard to a material fact which embodies a promise of future action without the present intention to carry out the promise, made with knowledge of the falsity, and which is relied upon to his detriment by the injured party. *See, e.g., Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. App. 1990), *appeal denied*, (1991).

accepting irregular or late payments existed.[11] Because the court had previously provided the debtor with ample opportunity to state with specificity the matters upon which the third count was based and the debtor had failed to do so, the third count of the amended countercomplaint was dismissed.

The fourth count of the amended countercomplaint alleged that "all debts claimed to be owed by said Creditor are null and void in that, such Creditor has violated said Federal Truth & Lending Laws, pertaining to the Consumer's Rights to Cancel." The debtor cited 12 C.F.R. §§ 226.15 and 226.23 as the statutory basis for that claim. However, those regulations are only applicable when "a security interest is or will be retained or acquired in a consumer's principal dwelling." *See* 12 C.F.R. §§ 226.15 and 226.23. The debtor did not allege that any of the numerous transactions between him and JFS involved a security interest in the debtor's principal dwelling, and none of the exhibits to the complaint and amended countercomplaint evidence that real property was provided as security for the loans. Indeed, all of the collateral which was provided as security by the debtor appeared to be personalty. Accordingly, the court dismissed the debtor's fourth count for failure to state a

[11]*See, e.g., Overholt v. Merchants & Planters Bank*, 637 S.W.2d 463 (Tenn. App. 1982); *Lively v. Drake*, 629 S.W.2d 900 (Tenn. 1982).

claim.

Finally, the debtor alleged in his fifth count of the amended countercomplaint that exhibits B, D, F, H, and I to JFS's complaint were forgeries. Specifically, the debtor averred that exhibits B, D, F, and H were signed in blank by the debtor, the codebtor or both, and information was fraudulently filled in thereafter by JFS. The debtor claimed that exhibit I was a photocopy forgery deliberately altered by JFS "to accuse the Debtor of some type of fraudulent activity and to secure certain other loan agreements that were not secured by such property." In the order of July 21, 1995, the court directed that these allegations would be considered in defense to the claims of JFS and allowed the debtor to amend the count to set forth any claim for damages which the debtor incurred as a result of the alleged forgeries. Because the debtor failed to so amend other than in a conclusory fashion,[12] the court

[12]For example, exhibits B, D, F, and H all appeared to be applications for credit, with the portions being filled in pertaining to the credit history of the debtor as obtained by JFS. Those exhibits formed the basis for JFS's various assertions that the debtor's liability for certain loans should be nondischargeable pursuant to § 523(a)(2)(B) because the debtor knowingly provided materially false financial statements to JFS for the purpose of deceiving it and inducing it to make the loans in question to the debtor. As stated above, the debtor's assertion that the statements were forgeries would be considered in defense to JFS's nondischargeability claims, and in the event the debtor were to prevail upon such a defense,
(continued...)

dismissed the debtor's fifth count contained in the amended countercomplaint.

After the court ruled on September 29, 1995, upon the JFS's motion to dismiss the debtor's amended countercomplaint, the debtor, on October 2, 1995, filed a motion for default for failure to answer amended countercomplaint, a belated objection to plaintiff's second motion to dismiss, and a notice of change of address. By order entered October 4, 1995, the court denied the motion for default since the court had dismissed four of the five counts in its order of September 29, and the time for serving a response to the remaining count would not expire until after October 9, 1995. On October 10, 1995, JFS filed an answer

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[12](...continued)
costs may be awarded pursuant to Fed. R. Bankr. P. 7054(b). But the debtor's mere assertion that he had suffered injury due to having to defend against such claims does not constitute grounds for affirmative relief as a result of the alleged forgeries. The debtor did not allege that the loans were not made because of incorrect information and in fact did not even assert that the information filled in was incorrect.

Similarly, exhibit I is a schedule of collateral for what appeared to be a renewal loan provided to the debtor. Again, despite the debtor's assertion that the alleged forgery permitted certain loans to be secured by collateral that it would otherwise not be secured by, there was no allegation that JFS foreclosed upon collateral that it was not otherwise entitled pursuant to other loan agreements, or that JFS misapplied the proceeds from any foreclosure sale. In summary, the debtor failed to state a cause of action based upon those alleged forgeries because he did not allege the nature of any damages incurred as a result thereof. At the most, the debtor only demonstrated that the alleged forgeries may be considered as a defense to the claims of JFS.

to the remaining count in the debtor's amended countercomplaint, which contained a certificate of service evidencing that a copy thereof had been served upon the debtor by U.S. mail on October 6. On October 20, 1995, the debtor filed a second motion for default for failure to answer the amended countercomplaint. By order entered October 25, 1995, the court denied the debtor's second motion for default since the certificate of service attached thereto stated that the debtor had been served and because, upon receiving a copy of the motion, JFS's counsel filed another certificate of service stating that the debtor had again been served with a copy of the answer on October 18, 1995.

On November 14, 1995, in accordance with the court's scheduling order of June 1, 1995, a final pretrial conference was conducted in this adversary proceeding. Despite the dictates of Fed. R. Civ. P. 16(d) mandating the appearance of the parties or their counsel at such a conference, the debtor did not attend the final pretrial conference, nor did he request that his appearance be waived. Counsel for JFS announced at the conference that counts 11 though 15 seeking a denial of discharge were being withdrawn, leaving only count 1 and counts 6-10 of the complaint which sought determinations of dischargeability pursuant to § 523(a)(2)(A) and (B). By order entered November 16, the withdrawn counts were stricken, and the

court directed that the parties file pretrial statements within ten days. On November 29, 1995, JFS filed its pretrial statement, together with a notice of withdrawal of counts 1, 6, 7 and 9 of its complaint, which only left for trial counts 8 and 10 seeking a determination of nondischargeability pursuant to § 523(a)(2)(A). On that day, JFS also filed its mandatory Rule 26(a)(3) disclosures.

On December 6, 1995, the debtor filed an untimely pretrial statement and an objection to plaintiff's withdrawal of counts 1, 6, 7, and 9. The objection was based upon the debtor's allegations that JFS "instituted this litigation in an effort to hinder and harass and cause malicious harm and that, such litigation has never had any merit" and because the debtor had requested relief in accordance with 11 U.S.C. § 523(d). The debtor apparently believed that the withdrawal of those counts would prevent his recovery of costs incurred in defending those counts under § 523(d). The court concluded, however, that the debtor was not prejudiced by the withdrawal because he still had the opportunity to present proof that the position of the creditor prior to that withdrawal was not substantially justified, assuming the withdrawn counts pertained to "consumer debt." Accordingly, the court overruled the debtor's objection to JFS's withdrawal of counts 1, 6, 7 and 9.

At no time did the debtor ever make the mandatory disclosures required by Fed. R. Civ. P. 26(a)(3) and as previously ordered by the court on June 1, 1995.

II.

Compared to the protracted pretrial stage, the trial of this matter was a very brief affair, lasting only a few hours, and involving the testimony of only two witnesses. The debtor chose not to take the stand and testify either in defense of counts 8 and 10 being prosecuted by JFS or on his own behalf in support of his claim against JFS.

The first witness offered by JFS, Ann Wright, testified that she was the manager of the Morristown office of JFS and had held that position for the past eight years, that she had been involved in making loans to Frank and Audrey Pease and had witnessed their signatures on numerous documents. Regarding the two loans at issue, Ms. Wright authenticated the documents which were a part of loan file no. 4537, including the promissory note dated February 26, 1993, in the amount of $10,104.48, the schedule A attached thereto which listed the various collateral being pledged for the loan, and a copy of the UCC-1 on file with the Register's Office for Hamblen County, Tennessee. Ms. Wright testified that all the documents were complete when executed by

the debtor and his former wife, Audrey Pease, and that she witnessed the signing of each of the documents by the debtor and Audrey Pease. She further stated that the purpose of the loan was to combine two accounts by paying them off with the monies from the new loan and that the previous loans which were paid off had been obtained, at least in part, for the debtor's business, All-In-One Construction Co.

The debtor challenged the introduction of schedule A into evidence because it was a copy and not the original. Ms. Wright explained that the original was unavailable because it was on file with the UCC-1. The objection was overruled because JFS had disclosed all of the loan documents in both its initial Fed. R. Civ. P. 26(a)(1) initial disclosures filed on July 28, 1995, and in its Fed. R. Civ. P. 26(a)(3) final pretrial disclosures filed on November 29, 1995, and the debtor had waived any such objection to the authenticity of schedule A by failing to timely object to its use at trial as directed by the court in its order of June 1, 1995.[13] Additionally, no good cause existed for excusing the debtor's failure to object since he had made no

[13]The pertinent language of that order tracks the language of Fed. R. Civ. P. 26(a)(3), as incorporated by Fed. R. Bankr. P. 7026, which, *inter alia*, requires that any objection to documents which are identified for use at trial, other than one based upon relevancy, be filed within 14 days after the Rule 26(a)(3) disclosures or it shall be deemed waived.

effort to either examine the documents before trial or otherwise attend the final pretrial conference and raise this matter prior to trial. Most importantly, the court was not convinced that any genuine issue existed as to the document's authenticity which would otherwise require the introduction of the original.[14] *See* Fed. R. Evid. 1003. The court did state that the debtor could of course cross-examine the witness regarding schedule A. Accordingly, the loan documents were introduced as collective exhibit 1.

Next, the documents that comprise loan no. 4672 were authenticated by Ms. Wright and introduced as collective exhibit 2. As with the prior loan, she testified that the promissory note dated May 12, 1993, in the amount of $2,156.40, and the schedule A attached thereto, were complete when executed by the debtor and Audrey Pease, and that she witnessed each of the borrowers sign the documents. The original of that particular schedule A was introduced into evidence, apparently because no UCC-1 was filed in connection with this loan.

Upon cross-examination by the debtor, the witness

[14]Despite the debtor's allegations of forgery (and the differences between schedule A and exhibit I discussed below) there was no absolutely no evidence of forgery presented to the court. Ms. Wright testified that the debtor signed the original and that the duplicate tendered into evidence was an accurate representation of the original. The debtor offered no evidence, not even his own testimony, to rebut Ms. Wright's testimony.

acknowledged that exhibit I to the complaint, which purported to be a copy of the schedule A to the loan of February 26, 1993, did not appear to be identical to the copy which was tendered into evidence, and she could not explain the discrepancy.[15] Ms. Wright also could not specifically recall what particular loans had been paid off with the proceeds from that loan, although she believed that one existing loan had in effect been rolled into the new loan and that the additional monies to borrowers were used to pay off another.

Regarding the loan of May 12, 1993, Ms. Wright stated that the loan was to pay off a prior 30-day term loan and that no additional funds were distributed to the borrowers. She did not testify, as she did with the other loan at issue, that the proceeds paid off a loan which had been obtained by the debtor and Audrey Pease for the debtor's business. When questioned by the debtor concerning how she could she testify that the schedule A to the May 12 loan was an original, she replied that the dates and signatures were original but that the various security listed in the middle portion of the document was

[15]For example, exhibit I has a default provision at the bottom of the page immediately preceding the parties' signatures. Schedule A introduced at trial has no such default paragraph and the word "schedule" in the title is misspelled as "scheule." In all other aspects, the documents appear to be the same.

photocopied from previous security agreements with the debtor. Although the debtor attempted to infer from that testimony that the entire document was a forgery, the court clearly understood Ms. Wright's testimony to be that in preparing that particular schedule A, she began with a form which had a standard introductory paragraph granting a security interest in property to be listed thereunder, a blank space in the middle wherein the property was be listed, a standard conclusory paragraph at the end regarding what could happen in the event of default, and blank lines for the signature by the borrower, the witness thereto and date. Taking that form, Ms. Wright copied onto the middle a list of property which had been previously pledged by the debtor and Audrey Pease in connection with prior loans and then presented the completed document to the borrowers for their signature, who signed the document in its present form.

Upon redirect, Ms. Wright testified that a security interest in the property listed in each schedule A was previously granted by the debtor in connection with a loan of November 30, 1992. A copy of that security listing was later introduced as exhibit 3. Ms. Wright further testified that the enterprise 24" power planer, serial no. 70233, was listed as a part of the property being pledged in each schedule A which accompanied the two promissory notes for the loans at issue, and that neither of the

two loans would have been made if JFS had known that the debtor did not have the ability to pledge the power planer as security for the repayment of those loans. Ms. Wright also identified a valuation dated May 8, 1991, which contained, *inter alia*, the debtor's handwritten value of $10,000 next to the entry of the power planer. The purpose of that valuation, according to Ms. Wright, was to determine whether enough security existed to make the loans requested by the debtor. That document was signed by the debtor and Audrey Pease and witnessed by Ms. Wright and relied upon by JFS to establish a value for the power planer for lending purposes. The document was later introduced into evidence as exhibit 4. Ms. Wright stated that the power planer was not recovered.

The next witness called by JFS was Johnny Branson. Mr. Branson is the vice-president of JFS and has held that office for 14 years. He stated that he had dealt with the debtor on an almost weekly basis over a long period of time and was familiar with his loans. After the debtor went into default, Mr. Branson starting gathering collateral in a effort to satisfy the outstanding loans. In attempting to repossess the collateral, he found that some of the collateral was missing, including the power planer. Mr. Branson stated that he had received a call from an employee of the debtor who told him that the power

planer had been sold. When Mr. Branson told the debtor that JFS was turning the matter over to the district attorney's office for prosecution, he said that the debtor asked him how he found out. Mr. Branson stated that the debtor did not deny that he had transferred the power planer, and at no point in time did the debtor ever state that he did not owe the indebtedness or that he had not pledged the power planer as security.

Upon cross-examination, Mr. Branson was questioned regarding JFS's proof of claim filed in Audrey Pease's bankruptcy case wherein JFS stated in response to paragraph no. 9, "No security interest is held for this claim except," as follows: "None. All secured collateral has been recovered and sold with proceeds applied to reduce Debtor's balance." That document was later entered into evidence as Exhibit 5. Mr. Branson explained that what he meant by that was that all collateral had been recovered that could be recovered and that the power planer was not recovered because it couldn't be recovered. Again, the debtor attempted to infer that Mr. Branson had provided inconsistent testimony. However, the two statements are not irreconcilable. As demonstrated upon re-direct, it is more than plausible that Mr. Branson was referring to all collateral that could have been recovered when he filed the proof of claim and his testimony at trial that the power planer had not been recovered was not

inconsistent with what was contained in the proof of claim.

With that proof, and relying upon the certified copies of the debtor's convictions previously tendered in support of its motion for summary judgment on January 13, 1995, JFS rested. Ms. Wright was then recalled to the stand by the debtor. Again, a majority of the debtor's questions to this witness centered upon the manner in which the two schedule As were prepared. Upon cross-examination, Ms. Wright restated that the two schedules were prepared as described above and then signed by the debtor and Audrey Pease. She also restated that the loans would not have been made if she knew that the power planer had been sold.

Thereafter, the debtor requested that the court consider as evidence the copies of Audrey Pease's tax returns for 1992 and 1993, and the debtor's tax return for 1992, which were attached as exhibits to his answer and countercomplaint filed on June 8, 1994. The debtor desired that the court consider the information contained in those returns as support for the debtor's claim that the position of JFS was not substantially justified with respect to certain of the withdrawn counts. The debtor asserted that the tax returns would refute JFS's claims in counts 3, 5, 6, 7 and 9 that the debtor had overstated his income in connection with the filing of financial statements

which induced JFS to make the loans. JFS objected to the admission of those tax returns upon the basis that the debtor had not disclosed prior to trial that he intended to offer these documents at trial as required by this court's scheduling order and Fed. R. Civ. P. 26(a)(3) since the debtor did not file the mandatory Rule 26(a)(3) disclosures. The court sustained the objection, but indicated that the debtor could take the stand and testify regarding what his income was over that particular period of time. The debtor did not choose to do so.

III.

Count 8 of JFS's complaint alleges that as an inducement to extend the loan of February 26, 1993, the debtor granted a security interest in the power planer but at the time the security interest was conveyed, the debtor had already sold the power planer. Count 10 of the complaint similarly alleges that as an inducement to extend the loan of May 12, 1993, the debtor granted a security interest in the power planer but the power planer had already been sold by the debtor. Accordingly, JFS avers that the loans were obtained by false pretenses, false representations or actual fraud and are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) which provides as follows:

> A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

It is well settled in this circuit that in order to except a debt from discharge under § 523(a)(2)(A), the creditor must prove that the debtor, with the intent to deceive, obtained money, property, services, or an extension, renewal, or refinancing of credit through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth, that the creditor justifiably relied on the false representation and its reliance was the proximate cause of its loss. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993). *And see Field v. Mans*, ___ U.S. ___, 116 S. Ct. 437 (1995)(justifiable rather than reasonable reliance must be demonstrated).

The uncontroverted evidence is that the two loans at issue were made to the debtor based upon a pledge of security, which included the 24" Enterprise power planer, serial no. 70233, that the debtor had valued at $10,000.00. Both promissory notes reference an attached schedule A, which lists the power planer as security for the notes.

It was also uncontroverted that the debtor did not own the power planer when it was pledged because he had previously sold the power planer to a third party. This fact is established by the testimony of the witnesses and by the debtor's guilty plea to the felony charge of "Hindering Secured Creditors," TENN. CODE ANN. 39-14-116, entered by the debtor on December 12, 1994. *See* March 22, 1995 memo. opin. at pp. 2-4. The substance of that charge was that, on September 18, 1992, prior to the grant of a security interest on February 26 and May 12, 1993, the debtor "did unlawfully, with intent to hinder enforcement of a security interest, security agreement or lien on a 24-inch Enterprise Power Planer (serial no. 70233) held by Jefferson Financial Services, remove, conceal and transfer the property ...." *Id.* Debtor was sentenced to one year in the Hamblen County Jail, and ordered to pay restitution in the amount of $16,460.29. *Id.*

The debtor raised the argument at trial that it was not a guilty plea that he entered, but an "Alford 'best interests' plea," and that he has appealed that conviction. The court, at great length, previously considered and rejected the latter argument and held that the fact that the conviction was on appeal did not affect its finality for collateral estoppel purposes. *Id.* at pp. 7-10. Concerning the Alford Plea, such a plea is a guilty plea in all material respects. *U.S. v.*

Tunning, 69 F.3d 107, 110-11 (6th Cir. 1995)("The so-called 'Alford plea' is nothing more than a guilty plea entered by a defendant who either: (1) maintains that he is innocent; or (2) without maintaining his innocence, 'is unwilling or unable to admit' that he committed 'acts constituting the crime," *quoting North Carolina v. Alford*, 400 U.S. 25, 37 (1970)). Accordingly, the certified copy of the debtor's guilty plea to the felony charge of unlawfully selling the power planer on September 12, 1992, which plea was made a part of the record upon JFS's motion for summary judgment filed on January 13, 1995, conclusively establishes that the debtor sold the power planer prior to granting a security interest in the power planer in connection with the loans of February 26 and May 12, 1993.[16] Thus the first element of § 523(a)(2)(A) was clearly proven, that the debtor obtained money or a renewal of credit through a false representation.

The evidence also undisputably establishes that the representation was material, was made with the intent to deceive, that JFS justifiably relied on the representation and

[16]Even without considering the guilty plea, the evidence provided by the witnesses at trial established that the debtor had transferred the power planer prior to the loans of February 26 and May 12, 1993, and the debtor offered no testimony to the contrary.

its reliance was the proximate cause of its loss. Ms. Wright testified, and that testimony was uncontroverted, that in making the loans in question JFS relied upon the representation of the debtor that he owned the power planer and had the right to pledge it as security. She further testified that but for the pledge of that power planer, the loans would not have made. Thus, the misrepresentation of ownership of the power planer by the debtor was that of a material fact. *See* RESTATEMENT (SECOND) OF TORTS § 538 (1977)(matter is material is if a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question). The fact that the power planer had been previously pledged as security by the debtor for prior loans which he obtained from JFS, coupled with the lack of any reason for JFS to believe that the debtor had disposed of it, demonstrates to the court that JFS's reliance was justified when it relied upon the debtor's representation of ownership of the power planer in extending the two loans at issue. *See Field v. Mans*, 116 S. Ct. at 442-44. Finally, the intent to deceive element is established by the debtor's undeniable knowledge that he did not own the power planer at the time he pledged it for the two loans at issue. *See United Virginia Bank v. Dishaw*, 78 B.R. 120, 125 (Bankr. E.D. Va. 1987)(court may infer intent to deceive from false

representation of ownership which debtor knows or should know will induce creditor to lend).

Debtor's arguments that JFS has forged documents, including the two schedules listing the power planer as security, and that the proof of claim filed in Audrey Pease's bankruptcy case established that the power planer had been recovered by JFS are all "smoke and mirrors" designed to cloud and obscure the debtor's fraudulent conduct. If the debtor had not intended to grant JFS a security interest in the power planer in connection with the loans in question and truly believed that it was not his signature on the documents but that the documents had been forged, he could have testified so. Without such evidence being offered and in light of the uncontroverted evidence to the contrary, the only conclusion the court can reach is that no documents were forged and that the debtor intentionally misrepresented the ownership of the power planer, and granted JFS a security interest in property he did not own in order to induce JFS to make the two loans to him of February 26 and May 12, 1993. As a result of that false representation by the debtor which was justifiably relied upon by JFS in extending the loans of February 26 and May 12, 1993, the loans will be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Regarding the debtor's claim under § 523(d) for costs,[17] no evidence was offered which established that any loans being discharged, if any, constituted "consumer debt." Moreover, even if such evidence had been submitted, the debtor failed to establish that the position of JFS in asserting counts 1, 6, 7, and 9,[18] was not substantially justified. Accordingly, the debtor's claim will be dismissed.

IV.

Finally, the court will address the remainder of debtor's arguments contained in his post-trial brief that otherwise have not been discussed above. First, with regard to the presentment of JFS's case, the court found the testimony of both Ms. Wright and Mr. Branson to be completely credible. And contrary to the statements of the debtor, the court is not aware of any "forged"

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[17]11 U.S.C. § 523(d) provides that "[i]f a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

[18]Of the other counts in which JFS asserted a claim of nondischargeability, JFS was granted summary judgment on counts 2 and 4, with the alternative theories of relief asserted in counts 3 and 5 being mooted by that summary judgment, and counts 8 and 10 were likewise decided in JFS's favor.

documents which may have been presented to the court by JFS. Concerning the now infamous exhibit I to the complaint, the fact that the document is not identical to the exhibit that was tendered into evidence by JFS as being the attached schedule A to the promissory note of February 26, 1993, does not mean that the document was forged. If the debtor wanted to prove that his signature was forged upon that exhibit I, he could have simply testified to that fact. He chose not to do so. The fact that no explanation was offered by either party as to the discrepancy does not otherwise detract from the evidence which was submitted. Ms. Wright testified that she witnessed the debtor sign schedule A, a copy of which was submitted as a part of collective exhibit 1, and that the copy thereof was true. The debtor offered no proof to the contrary.

Regarding the countercomplaint, the debtor claims that the "Court, by virtue of entering an order that quashed the Counterplaintiff's effort to procure discovery as he attempted to obtain answers to interrogatories, not once but twice, has inhibited the Counterplaintiff's effort to prosecute his claim." The failure of the debtor to prosecute his claim lies with the debtor. True, the court would not allow the debtor to submit unduly burdensome interrogatories to JFS which consisted of a total of 130 questions, the scope of which far exceeded the

bounds of Rule 26(b)(1). However, the court did allow the debtor the opportunity to submit 25 interrogatories, and of course the debtor was not precluded from utilizing any other means of discovery available to him. The debtor chose not to do so.

The debtor also complains in his post-trial brief that:

> [t]he Court further inhibited prosecution of the countercomplaint by disallowing the Counterplaintiff the procurement of his request for the production of documents in that, said Court entered an order that would allow the Counterplaintiff procurement of such copies only if he were to travel to the State of Tennessee. The Court having already been apprised of the Counterplaintiff's embellishment in financial difficulty that prohibited such an expensive outlay of funds."

This court, in light of the debtor's feigned "financial difficulty," entered an order and filed a memorandum on July 21, 1995, which directed JFS to take the debtor's deposition in Connecticut, unless the debtor was coming to Tennessee to conduct his own discovery. Thus the debtor was given a choice between traveling to Tennessee to give his deposition and participate in discovery by examining documents, *etc*., or foregoing that discovery, in which case the court would not require him to appear in Tennessee for that deposition even though the lawsuit is pending here. It was the debtor's choice, pure and simple, to forego discovery and the court has in no way

inhibited the debtor from conducting discovery within the bounds on Fed. R. Civ. P. 26. From his statements, the debtor appears to suggest that JFS not only should have produced the requested documents, but should also have been required, at its own expense, to copy the voluminous documents and transport them to the debtor in Connecticut. Although no such request was made by the debtor, it would have been denied, not only as grossly inequitable, but also inappropriate.

And last, the debtor states that the "Court further inhibited the Counterplaintiff's claim for the procurement of justice, when it arbitrarily dismissed four counts of the Countercomplaint without the effect of "DUE PROCESS" being afforded to the complainant." The court did not arbitrarily dismiss those four counts. The ruling was on the merits, after the time for a response by the debtor had long since passed, and after the debtor had been given every opportunity to amend his countercomplaint to properly set forth his alleged claims. Looking back to those counts now that the trial has transpired, the court, without hesitation, can state that those four counts asserted by the debtor were meritless and had no foundation in law or in fact. Moreover, the debtor's conduct in this adversary proceeding, as evidenced by the assertion of those four frivolous counts, his filing of innumerable baseless

motions and objections, his requests for continuance after continuance, his failure to comply with reasonable deadlines and mandatory pretrial disclosures, and his unexcused nonappearances for pretrial conferences and other hearings, has been irresponsible and reprehensible, designed solely to delay this court in reaching the irrefutable conclusion that the debtor was guilty of fraud in connection with his dealings with JFS.

V.

In conclusion, the court will enter an order contemporaneously with the filing of this opinion determining[19] that the two loans of February 26 and May 12, 1993, which are the subject of counts 8 and 10 of JFS's complaint, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2), and dismissing the debtor's claim under 11 U.S.C. § 523(d).

FILED: March 21, 1996

BY THE COURT

_____
MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

[19]Although JFS requested a judgment in its complaint, counsel for JFS announced at the trial that only a determination of nondischargeability was being sought as relief, which was not opposed by the debtor.